Government of the State of Sabah v Syarikat Raspand (suing as a firm)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01–77 OF 2005
LOW HOP BING, MOHD HISHAMUDIN AND CLEMENT SKINNER JJCA
24 JUNE 2010

Civil Procedure — Action — Government proceedings — Tort action against state government — Failure to include officer responsible for alleged tortious act as party — Whether action could be maintained against state government alone — Government Proceedings Act 1956 ss 5 & 6

Civil Procedure — Appeal — Memorandum of appeal — Raising new grounds on appeal — Whether court of Appeal confined to grounds raised in memorandum of appeal — Rules of the Court of Appeal 1994 r 18(1) & (2)

Tort — Vicarious liability — Liability of government — Failure to include officer responsible for alleged tortious act as party — Whether action could be maintained against state government alone — Government Proceedings Act 1956 ss 5 & 6

Trade and Industry — Forestry — Possession of logs without lawful authority — Seizure of logs by Sabah Forestry Department — Whether seizure made without reasonable or probable cause — Whether Sabah Forestry Department protected under Forest Enactment 1968 (Sabah) ss 37A & 40

Words and Phrases — Reasonable or probable cause — Definition, of — Forest Enactment 1968 (Sabah) s 37A

The Ministry of Primary Industries Malaysia had approved the plaintiff/respondent's application to import logs. On 18 January 1997, the defendant/appellant seized from the plaintiff a total of 3,056 logs, based on suspicion that offences under the Forest Enactment 1968 (Sabah) ('the Forest Enactment') had been committed. The species of logs seized were those normally produced in Sabah and there was no serial number or marks to indicate that royalty had been paid to the defendant. There was no import licence issued in respect of the logs as required under the Customs

(Prohibition of Imports) Order 1988. The defendant claimed that the logs could not have come from Indonesia as Indonesia had disallowed the export of logs at the material time. The defendant however returned the seized logs to the plaintiff upon being ordered to do so by the Tawau Magistrate's Court. The plaintiff then commenced this action for wrongful seizure of the logs. The High Court held that the defendant was liable for wrongful seizure of the plaintiff's logs. Hence this appeal. The defendant contended that there was reasonable or probable cause to seize the logs and sought protection under ss 37A and 40 of the Forest Enactment. The plaintiff responded that the defendant's contention was misconceived as the learned judge had made a finding of fact that the impugned logs originated from Indonesia. The learned state attorney general also relied on ss 5 and 6 of the Government Proceedings Act 1956 ('GPA') and r 18(2) of the Rules of the Court of Appeal 1994 ('RCA') to raise an issue of substantive law relating to jurisdiction which was neither raised in the High Court nor included in the memorandum of appeal. It was submitted that the plaintiff's action was tort-based but the plaintiff had only named the Government of Sabah without naming the alleged tortfeasor(s) as defendant(s). As such, it was claimed that the action was not maintainable in law. The plaintiff objected to this issue being raised as it was not raised in the High Court nor included in the memorandum of appeal.

Held, allowing the appeal with costs here and below:

(1) (per **Low Hop Bing JCA**, majority) Rule 18(2) of the RCA has given due recognition to the common law position concerning the powers of the Court of Appeal to permit or reject grounds which are neither raised in the High Court nor included in the memorandum of appeal. An important issue of jurisdiction had been raised. Having regard to the justice of the case, the court ought not shut its mind to this issue. As such, the matter was allowed to be ventilated by the parties (see paras 20 & 33).

(2) (per **Low Hop Bing JCA**, majority) Section 6 of the GPA expressly prohibits the bringing of any proceedings against the government for damages under s 5 unless the action for such wrongful act, neglect or default would have lain against the officer personally. In the absence of the officer's liability, (which can only arise and bind the officer(s) if and when the officer or officers are cited as defendants), no proceedings shall lie against the government. Where no such proceedings could lie against the government, the court is in no position to exercise any jurisdiction in relation thereto. The omission on the part of the plaintiff to name the government servants or officers as the defendants resulted in the failure to satisfy the requirements of ss 5 and 6 (see paras 36 & 40).

(3) (per **Low Hop Bing JCA**, majority) Section 37A precludes the

entitlement to costs, damages or other relief, unless the seizure under the Forest Enactment was made without reasonable or probable cause. In the context of s 37A, the definition of the words 'reasonable or probable cause' may be applied mutatis mutandis to mean an honest belief in the rightful seizure of the logs in the exercise or purported exercise of the power conferred under the Forest Enactment (see paras 43 & 49).

(4) (per **Low Hop Bing JCA**, majority) Since the alleged tortfeasors were not cited as the defendants, no liability could be attributed to them. As the Government of the State of Sabah was incapable of making the seizure, no liability could be attached to it either. Therefore, the plaintiff had not discharged the burden of proving that the seizure of the logs had been made by the defendant without reasonable or probable cause. Furthermore, at the time of the seizure of the logs, the plaintiff had no documents at all to show the sale and purchase of the logs from Indonesia. The seizure could not be said to have been made without reasonable or probable cause (see paras 50–51).

(5) (per **Low Hop Bing JCA**, majority) Under s 40, as in s 37A, the burden of proof is on the plaintiff to establish that the plaintiff's loss or damage arose out of a malicious, fraudulent or grossly negligent act of the officer of the defendant. The non-citation of the alleged tortfeasors ie the officers as the defendants was fatal to the plaintiff's case in so far as s 40 was concerned (see paras 53–54).

(6) (per **Mohd Hishamudin JCA**, dissenting) To determine as to whether a forest officer has 'reason to believe that a forest offence has been committed' the court must examine the circumstances objectively and not subjectively. Suspicion alone is insufficient to justify any seizure. The suspicion must have a reasonable basis. The defendant's forest officer (DW1) had no reasonable suspicion to seize and to detain the logs. DW1 failed to make a basic inquiry before he made the seizure. DW1 in seizing and detaining the logs was merely following blindly the directives of the Chief Minister, whose directives were clearly unlawful (see paras 76, 81–82 & 92).

(7) (per **Mohd Hishamudin JCA**, dissenting) Section 40 is only concerned with a property (or forest produce) 'while detained by, or otherwise in the custody of' a forest officer. This provision is only applicable where the *seizure* is lawful in the first place but *subsequently* damage is caused to the property, or loss is caused to the owner of the property, while the property was being *detained* or *in the custody* of an officer, by reason of a malicious, fraudulent or grossly negligent act of the officer concerned. It does not afford protection to the officer where the seizure was unlawful in the first place (see para 102).

(8) (per **Mohd Hishamudin JCA**, dissenting) There must be strict adherence and respect for the RCA. Leave to include the new point should have been obtained first. The defendant had ample time to apply for the leave. The new ground that the defendant attempted to raise was not even a new or a novel issue at all. Rule 18(2) of the RCA should only be resorted to sparingly and in very exceptional circumstances; and even then, it ought to be at the instance or on the volition of the court rather than on the urging of a 'defaulting' party (see paras 109 & 111).

[Bahasa Malaysia summary

Kementerian Perusahaan Utama telah meluluskan permohonan plaintif/responden untuk mengimport balak. Pada 18 Januari 1997, defendan/perayu telah merampas daripada plaintif sejumlah 3,056 balak, berdasarkan rasa syak bahawa kesalahan-kesalahan di bawah Enakmen Hutan 1968 (Sabah) ('Enakmen Hutan tersebut') telah dilakukan. Spesies balak yang dirampas adalah yang biasanya dihasilkan di Sabah dan tidak ada nombor bersiri atau tanda untuk menunjukkan bahawa royalti telah dibayar kepada defendan. Tiada lesen import dikeluarkan berkaitan balak tersebut sepertimana dikehendaki di bawah Perintah Kastam (Larangan Import) 1988. Defendan mendakwa bahawa balak tersebut tidak mungkin boleh keluar dari Indonesia kerana Indonesia tidak membenarkan pengeksportan balak pada masa matan. Walau bagaimanapun defendan telah memulangkan balak yang telah dirampas tersebut kepada plaintif setelah diperintahkan berbuat demikian oleh Mahkamah Majistret Tawau. Plaintif kemudian telah memulakan tindakan ini kerana rampasan balak secara salah. Mahkamah Tinggi telah memutuskan defendan bertanggungjawab kerana rampasan salah balak plaintif. Justeru rayuan ini. Defendan menegaskan bahawa terdapat sebab munasabah atau berkemungkinan untuk merampas balak tersebut dan memohon perlindungan di bawah ss 37A dan 40 Enakmen Hutan tersebut. Plaintif membalas bahawa hujah defendan telah disalah tanggap kerana hakim yang bijaksana telah membuat penemuan fakta bahawa balak yang dipersoalkan berasal dari Indonesia. Peguam negara yang bijaksana juga bergantung kepada ss 5 dan 6 Akta Prosiding Kerajaan 1956 ('APK') dan k 18(2) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') untuk menimbulkan isu undang-undang substantif berkaitan bidang kuasa yang tidak pernah ditimbulkan di Mahkamah Tinggi mahupun dimasukkan dalam memorandum rayuan. Adalah dihujahkan bahawa tindakan plaintif berdasarkan tort tetapi plaintif telah hanya menamakan Kerajaan Sabah tanpa menamakan pelaku tort yang dikatakan itu sebagai defendan. Oleh itu, adalah dinyatakan bahawa tindakan tersebut tidak boleh dikekalkan dari segi undang-undang. Plaintif telah membantah isu ini ditimbulkan kerana ia tidak ditimbulkan di Mahkamah Tinggi mahupun dimasukkan dalam memorandum rayuan.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) (oleh **Low Hop Bing HMR**, majoriti) Kaedah 18(2) KMR telah diberikan pengiktirafan terhadap kedudukan common law berkaitan kuasa-kuasa Mahkamah Rayuan untuk membenarkan atau menolak alasan-alasan yang tidak ditimbulkan di Mahkamah Tinggi mahupun dimasukkan dalam memorandum rayuan. Isu penting tentang bidang kuasa telah ditimbulkan. Berdasarkan keadilan kes tersebut, mahkamah tidak patut menghalang isu ini. Oleh itu, perkara tersebut dibenarkan untuk dikemukakan oleh pihak-pihak (lihat perenggan 20 & 33).

(2) (oleh **Low Hop Bing HMR**, majoriti) Seksyen 6 APK dengan jelas menghalang apa-apa prosiding dimulakan terhadap kerajaan untuk ganti rugi di bawah s 5 kecuali tindakan untuk perbuatan salah, cuai atau kegagalan yang telah diambil terhadap pegawai secara peribadi. Dengan ketiadaan liabiliti pegawai, (yang hanya boleh timbul dan mengikat pegawai) jika dan apabila pegawai atau pegawai-pegawai dinamakan sebagai defendan-defendan), tiada prosiding patut diambil terhadap kerajaan. Di mana tiada prosiding sebegini diambil terhadap kerajaan, mahkamah bukan tidak berada dalam kedudukan untuk menggunakan apa-apa bidang kuasa berkaitannya. Peninggalan di pihak plaintif untuk menamakan kakitangan atau pegawai-pegawai kerajaan sebagai defendan-defendan telah menyebabkan kegagalan memenuhi keperluan ss 5 dan 6 (lihat perenggan 36 & 40).

(3) (oleh **Low Hop Bing HMR**, majoriti) Seksyen 37A menghalang kelayakan untuk kos, ganti rugi atau relief lain, kecuali rampasan di bawah Enakmen Hutan tersebut dibuat tanpa sebab yang munasabah atau berkemungkinan. Dalam konteks s 37A, definisi perkataan-perkataan 'reasonable or probable cause' boleh terpakai mutatis mutandis untuk bermaksud kepercayaan jujur dalam rampasan balak secara sah dengan menggunakan atau menggunakan bagi maksud kuasa yang telah diberikan di bawah Enakmen Hutan tersebut (lihat perenggan 43 & 49).

(4) (oleh **Low Hop Bing HMR**, majoriti) Memandangkan pelaku tort tidak dinamakan sebagai defendan-defendan, tiada liabiliti boleh berpunca daripada mereka. Memandangkan Kerajaan Negeri Sabah tidak berupaya membuat rampasan, tiada liabiliti boleh dikaitkan dengannya juga. Oleh itu, plaintif tidak melepaskan beban bukti bahawa rampasan balak tersebut telah dibuat oleh defendan tanpa alasan yang munasabah atau berkemungkinan. Bahkan, pada masa rampasan balak tersebut, plaintif tidak mempunyai apa-apa dokumen langsung untuk menunjukkan jual beli balak itu dari Indonesia. Rampasan itu tidak boleh dikatakan telah dibuat tanpa sebab yang munasabah atau berkemungkinan (lihat perenggan 50–51).

(5) (oleh **Low Hop Bing HMR**, majoriti) Di bawah s 40, seperti dalam s 37A, beban bukti terletak pada plaintif untuk membuktikan bahawa kehilangan atau kerugian plaintif timbul daripada tindakan berniat jahat, fraud atau kecuaian melampau pegawai defendan. Pelaku tort yang dikatakan tidak dinamakan iaitu pegawai-pegawai sebagai defendan-defendan memudaratkan kes plaintif sejauh mana s 40 adalah berkaitan (lihat perenggan 53–54).

(6) (oleh **Mohd Hishamudin HMR**, menentang) Bagi menentukan sama ada pegawai perhutanan mempunyai 'reason to believe that a forest offence has been committed' mahkamah perlu memeriksa keadaan secara objektif dan bukan secara subjektif. Rasa syak sahaja tidak memadai untuk menjustifikasikan apa-apa rampasan. Rasa syak perlu mempunyai asas yang munasabah. Pegawai perhutanan defendan (DW1) tidak mempunyai rasa syak yang munasabah untuk merampas dan menahan balak tersebut. DW1 telah gagal membuat soalan asas sebelum dia membuat rampasan. DW1 yang merampas dan menahan balak tersebut hanya menurut arahan Ketua Menteri secara membuta tuli, yang mana arahan-arahan itu jelas menyalahi undang-undang (lihat perenggan 76, 81–82 & 92).

(7) (oleh **Mohd Hishamudin HMR**, menentang) Seksyen 40 adalah hanya berkaitan dengan hartanah (atau hasil hutan) 'while detained by, or otherwise in the custody of' pegawai perhutanan. Peruntukan ini adalah hanya terpakai di mana rampasan itu sah pada mulanya tetapi berikutan itu ganti rugi telah disebabkan ke atas hartanah itu, atau kehilangan telah disebabkan ke atas pemilik hartanah itu, sementara hartanah itu ditahan atau dalam jagaan pegawai oleh sebab tindakan berniat jahat, fraud atau kecualian melampau pegawai berkaitan. Ia tidak memberikan perlindungan kepada pegawai di mana rampasan itu menyalahi undang-undang pada mula lagi (lihat perenggan 102).

(8) (oleh **Mohd Hishamudin HMR**, menentang) Perlu ada pematuhan ketat dan rasa hormat untuk KMR. Kebenaran untuk memasukkan perkara baru hendaklah diperoleh terlebih dahulu. Defendan mempunyai masa yang mencukupi untuk memohon kebenaran. Alasan baru yang cuba ditimbulkan oleh defendan bukannya isu baru langsung. Kaedah 18(2) KMR hendaklah hanya digunakan dengan bijak dan dalam keadaan yang istimewa, dan jikapun begitu, ia patut dengan kerelaan mahkamah dan bukan atas desakan pihak 'defaulting' tersebut (lihat perenggan 109 & 111).]

Notes

For a case on government proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 141.

For a case on possession of logs without lawful authority, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1868.

For cases on liability of government, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1772–1781.

For cases on memorandum of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1190–1205.

Cases referred to

Abdul Kareem v Rawther [1965] 2 MLJ 132, HC (refd)

Attorney General for the Straits Settlements v Pang Ah Yew [1934] MLJ 184, HC (refd)

Azman bin Abdullah v Ketua Polis Negara [1997] 1 MLJ 263; [1997] 1 CLJ 257, CA (refd)

Banbury v Bank of Montreal [1918] AC 626, HL (refd)

Chao Yan San v Yuen Ten Soo [2000] 3 AMR 3057, HC (folld)

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457; [1995] 4 CLJ 127, CA (refd)

Cheow Tong Chai & Anor v Tan Boon Lieu & Ors [2010] 3 MLJ 91, HC (folld)

Chia Sia Chek v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors [2009] 7 MLJ 609, HC (distd)

Government of Malaysia v Zainal bin Hashim [1977] 2 MLJ 254, FC (refd)

Haji Abdul Rahman v Government of Malaysia & Anor [1966] 2 MLJ 174; [1966] 1 LNS 60, HC (refd)

Haji Ali bin Haji Othman v Telekom Malaysia Bhd [2003] 3 MLJ 29, CA (refd)

Herniman v Smith [1938] AC 305, HL (folld)

Hicks v Faulkner (1878) 8 QBD 167 (folld)

Indah Water Konsortium Sdn Bhd v Yong Kon Fatt [2007] 5 MLJ 250; [2007] 4 CLJ 613, CA (refd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1, FC (refd)

Kesultanan Pahang v Sathask Realty Sdn Bhd [1997] 2 MLJ 701; [1997] 2 CLJ 723, CA (refd)

Lai Seng & Co v Government of Malaysia & Ors [1973] 2 MLJ 36; [1973] 1 LNS 70, HC (refd)

Lay Kee Tee dan lain-lain lwn Kerajaan Malaysia dan lain-lain [2005] 3 MLJ 576; [2004] 8 CLJ 382, HC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)

Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd [2004] 4 CLJ 18, CA (refd)

Rawther v Abdul Kareem [1966] 2 MLJ 201, FC (folld)

Syarikat Raspand (suing as a firm) v Government of the State of Sabah [2005] 7 MLJ 576, HC (refd)

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
Wong Lai Fatt v PP [1973] 2 MLJ 31, FC (refd)
Yap Piang v Wong Lee Nam [1933] MLJ 102, HC (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9, FC (refd)

Legislation referred to

Criminal Procedure Code s 413
Customs Act 1967 ss 115, 132
Forest Enactment 1968 (Sabah) ss 2, 30(1)(g), 36(1)(d)(i), 37A, 40
Forest Rules 1969 (Sabah) r 15(1)
Government Proceedings Act 1956 ss 5, 6
Rules of the Court of Appeal 1994 r 18(1), (2)

Roderic Fernandez (Md Hanafiah Md Kasim, State Counsel with him) (State Attorney General, State Attorney General's Chambers) for the appellant.
Sugumar Balakrishnan (Sugumar & Co) for the respondent.

Low Hop Bing JCA:

APPEAL

[1] On 22 July 2005, the Kota Kinabalu High Court held the appellant ('the defendant') liable for wrongful seizure of the respondent's ('the plaintiff's') logs and allowed the plaintiff's claim, with damages to be assessed: see *Syarikat Raspand (suing as a firm) v Government of the State of Sabah* [2005] 7 MLJ 576 (HC).

[2] Being dissatisfied, the defendant appealed against the decision of the High Court. By majority (Low Hop Bing and Clement Allan Skinner JJCA concurring; Mohd Hishamudin bin Mohd Yunus JCA dissenting), we allowed the defendant's appeal, with costs here and in the court below, and set aside the decision of the High Court. We now give our grounds for the majority judgment.

FACTS OF THE CASE

[3] The facts of the case consist of agreed facts as well as those established by way of evidence adduced at the trial.

[4] *The agreed facts* may be unfolded as follows:

(a) At the material time, the Ministry of Primary Industries Malaysia

approved the plaintiff's application to import 100,000 cubic meters (m3) of logs for sale to local sawmills in Tawau; and to import 50,000 m3 logs for exporting sale.

(b) On 18 January 1997, the defendant seized a total of 3,056 logs, 980 of which were in the process of being loaded onto the vessel MV ABLE HELSMAN, while the remaining 2,076 logs were still at Wallace Bay, Tawau.

(c) At the time of seizure, the 980 logs measuring 7,072.44 m3 were valued at RM2,263,180.80, while the other 2,076 logs measured 15,805.20 m3, for which the value was RM6,005,976.

(d) On the date of seizure, the plaintiff still had an unexhausted quota of 67,830 m3 logs to be imported for the purpose of supplying to local sawmills in Tawau with a prevailing market value of RM400 per m3, and another unexhausted quota of 36,340 m3 logs to be imported for the purpose of exporting them with a prevailing market value of RM623 per m3.

(e) On 31 March 1997, the Tawau Magistrate's Court ordered the 3,056 logs to be returned to the plaintiff as being entitled to possession thereof.

(f) On 1 April 1997, the defendant returned the said 3,056 logs to the plaintiff.

[5] *Other facts* established by way of evidence adduced at the trial are based on the pleadings. In this regard, para 7(a) to (f) of the defendant's statement of defence at p 65 of the appeal record avers to the effect that on 18 January 1997, the defendant seized the 3,056 logs on suspicion that offences under the (Sabah) Forest Enactment 1968 ('the Forest Enactment') had been committed. The grounds for the suspicion are:

(a) the species of logs are those normally produced in Sabah eg keruing, seraya merah, seraya putih, melapi, kapur etc;

(b) there was no serial number, no property hammer-mark, no royalty hammer-mark to indicate that royalty had been paid to the defendant;

(c) the logs could not have come from Indonesia as Indonesia had disallowed the export of logs at the material time; and

(d) there was no import licence issued in respect of the logs as required under the Customs (Prohibition of Imports) Order 1988.

[6] The evidence-in-chief of DW1, the Director of Forestry Sabah, adduced via question and answer 17 in his witness' statement at p 161 of the appeal record, reads:

17. Q: What happened when you were at the loading area in Wallace Bay? A

A: Upon arrival at Wallace Bay, we surveyed the swamp area and detected 2 rafts of approximately 2,157 logs in the fringes of Tawau Mangrove Forest Reserve and a raft of approximately 611 logs next to the ship. We inspected the logs and found no FD hammer markings, royalty markings, incised serial numbers or property marks on the logs. The logs only have painted numbers. (FD = Forestry Department) B

[7] Lower down the same page, in question and answer 19, DW1 confirmed the purpose of the detention ie for further investigation under the Forest Enactment: C

19. Q: What happened next?

A: At about 11.00 am, I informed the owner that the logs were detained for further investigation pursuant to the Forest Enactment. D

[8] When re-examined, DW1 reiterated as follows:

Grounds of reasonable suspicion firstly, they have no marking like property hammer mark. No Forestry Department or inspection being hammered on the logs. Serial Numbers were not incised on the logs. They had no timber disposal permit (TDPs) to show that Government Royalty had been paid. Furthermore, the logs consist of species found in abundance in Sabah (see p 139 of the appeal record). E

F

[9] The evidence-in-chief and the cross-examination of SP2, DSP Joseph Vun Fung Mung who was the head of the Commercial Crime Division of Kepayan, confirmed that on 20 February 1997, the defendant, at the request of the police, surrendered the 3,056 logs to the police for their own investigations (see para 14 of the plaintiff's statement of claim at p 55 of the appeal record, para 10 of the defendant's statement of defence pp 68, 85 and 86). G

[10] The evidence-in-chief of SP1, Jubaidah bt Mujun, confirmed that on 31 March 1997, the magistrate's court in proceedings under s 413 of the Criminal Procedure Code, initiated by the police, ordered the release of the 3,056 logs. H

[11] On 1 April 1997, the 3,056 logs were released to the plaintiff by the police. I

[12] On 8 April 1997, the plaintiff commenced this action for wrongful seizure of the 3,056 logs against the defendant only.

[13] No tortfeasor(s) was (or were) ever named as defendant(s).

RAISING NEW GROUND OF APPEAL

[14] Datuk Roderic Fernandez, the learned state attorney general, assisted by Mr Md Hanafiah Md Kassim, relied on ss 5 and 6 of the Government Proceedings Act 1956 and *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1, and r 18(2) of the Rules of the Court of Appeal 1994 to raise an issue of substantive law relating to jurisdiction which was neither raised in the High Court nor included in the memorandum of appeal. They submitted that:

(a) the issue relates to the requirement to name the tortfeasor(s) as the defendant(s) and this court is not barred from considering it: *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9; and

(b) the plaintiff's action is tort-based, in that it is a claim against the defendant for wrongful seizure of the plaintiff's property ie the 3,056 logs, but plaintiff had only named the defendant ie the Government of the State of Sabah without naming the alleged tortfeasor(s) as defendant(s). As such, the action is not maintainable in law.

[15] The respondent's learned counsel Mr Sugumar Balakrishnan sought support in *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29 (CA) and took exception to the defendant raising this issue as it was neither raised in the High Court nor included in the memorandum of appeal.

[16] In our view, the question for determination under this head may be formulated as follows:

> Where the plaintiff's claim is tort-based, such as the alleged wrongful seizure of the plaintiff's logs, and the plaintiff sues merely the government, without naming the government servants or officers as the alleged tortfeasors, and this issue or ground was neither raised in the High Court nor included in the defendant's memorandum of appeal, then upon the true construction of r 18(1) and (2) of the Rules of the Court of Appeal 1994, is the Court of Appeal empowered to consider this issue or ground, and decide thereon at the appellate stage?

[17] Consideration of this question must necessarily entail an inquiry into the legal implications of r 18(1) and (2), both of which merit reproduction as follows:

> 18 Memorandum of appeal
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> (1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of

objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.

(2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

[18] Rule 18(1) is free from controversy in this appeal. It prescribes the mandatory requirement for the appellant (the defendant herein) to prepare a memorandum of appeal, setting forth the grounds of appeal and specifying the points of law or fact alleged to have been wrongly decided.

[19] The bone of contention is focused on r 18(2). It consists of two limbs viz:

(a) Under the first limb, an appellant is not at liberty to advance any other ground except those included in the memorandum of appeal. He may however obtain leave of the Court (of Appeal) to do so. It is abundantly clear to us that this rule of exclusion is not absolute, as the court is vested with the discretion to grant leave to enable the appellant to argue or advance the other relevant ground(s) which was (or were) not included in the memorandum of appeal; and

(b) The second limb, which is even wider in scope than the first limb, declares *that the court in deciding the appeal shall not be confined to the grounds set forth by the appellant*. The court is therefore not legally bound to restrict the argument to the grounds contained in the memorandum of appeal. This second limb is consistent with the provisions of r 1A of the same Rules which expressly enacts, inter alia, that in administering any of these Rules, the court shall have regard to the justice of the particular case.

[20] In our view, r 18(2) has given due recognition to the common law position concerning the powers of the Court (of Appeal) to permit or reject the relevant grounds which are neither raised in the High Court nor included in the memorandum of appeal. These new grounds of appeal may be allowed to be argued and hence provide the foundation for consideration and determination by the Court of Appeal. At this juncture, it is appropriate for us to analyse the common law position.

[21] In *Yong Mok Hin*, MacIntyre J (as he then was), after a careful consideration of the relevant authorities, propounded the *general principle* and the *exceptions* thereto.

[22] The *general principle* was distilled from:

(1) *Attorney General for the Straits Settlements v Pang Ah Yew* [1934] MLJ 184 at p 187 (HC), where Reay J explained:

> The courts have often commented on the impropriety of raising, on appeal, questions that have not been raised at the hearing. In *Garden Gully Co v Mc-Lister* 1 App Cas 39, Their Lordships of the Privy Council said that though not holding parties strictly to their pleadings, they would not allow defences to be set up on appeal which had not been suggested in the pleadings or called to the attention of the courts below, and have refused in other cases to allow such points to be raised.

(2) *Banbury v Bank of Montreal* [1918] AC 626 at pp 659, 705, 714 (HL), where Lord Finlay LC said:

> The course of practice has always been regarded as well settled that points of law alleged entitling the party raising them to verdict or judgment must be made, at the trial, and that if they are not then made they cannot be raised afterwards.

[23] However, in *Yong Moh Hin*, MacIntyre J (as he then was) cautioned that:

(1) The observations of Reay J and Lord Finlay LC appear to be based on the general principle that where a decision on a question of law is dependant upon a finding of fact which was not made by a judge or jury because the question was not raised or put at the trial or where the question of law cannot be resolved without further evidence not available on the record, a court of appeal would not interfere with the judgment or verdict of the lower court.

(2) His Lordship added that the above general principle is subject to certain *exceptions*, as illustrated in *Banbury*, wherein the speeches of two learned Law Lords clarified that:

> There are no doubt cases in which the court of appeal have refused to allow points of law not taken in the court of the first instance to be raised on appeal. But *these cases do not go to jurisdiction, but to discretion*. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the jury. In such cases it would be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal. *In the present case there is no such element of unfairness or injustice. It is not suggested that had the point been taken below any further evidence could have been adduced*, or any further or different question left to the jury. *Why, then, should not the Court of Appeal have felt itself at liberty to do complete justice between the parties on the evidence before them? I can see no reason at all* (per Lord Parker).

> *It would require a great deal to persuade me that a Court of Appeal is bound to adjudicate wrongly because it had not occurred to either judge or counsel to raise a point of law in the court below. The way the appellant seeks to put it is that the Court of Appeal is not in such case asked to decide wrongly, but only to say that the point is one which it is not competent to them to decide at all because it was not argued below. The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because of a point of law has been overlooked below*. It may well be that under the circumstances the Court of Appeal could not justly allow the point of law to be raised. For instance, it may be that if the point had been raised in the court of the first instance the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no doubt say that it would not be fair to allow it to be raised. But that is a totally different thing from saying that it cannot be raised (per Lord Wrenbury). (Emphasis added.)

(3) In the concluding remark on this issue, at p 17, MacIntyre J (as he then was) stressed:

> *Two points emerge from the observations of Lord Parker and Lord Wrenbury*. They are, *first*, that *a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction; and, secondly, a Court of Appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order*.
>
> In the *Tasmania* case (1890) 15 App Cas 233 it was held that a Court of Appeal was competent to decide even a question of fact raised for the first time on appeal provided 'if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case, if the controversy had arisen at the trial; and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box (see judgment of Lord Herschell)'. (Emphasis added.)

[24] In the instant appeal, on the other hand, we are also mindful of the judgment of the Court of Appeal in *Haji Ali bin Haji Othman*, delivered by Gopal Sri Ram JCA (later FCJ) who had rejected the request by the appellant's counsel to raise the *nemo judex* point which was not raised in the court below. His Lordship held that the Court of Appeal will not, save in limited cases, entertain a point of law not taken at first instance.

[25] We respectfully note that the said rejection by the Court of Appeal in *Haji Ali bin Haji Othman*, is not intended to be construed as an absolute rule. The Court of Appeal did categorically say that, in limited cases, exceptions may exist for an appellate court to entertain a point of law not taken at first instance. It really must depend on the facts and circumstances of a particular case.

[26] Reverting to the mainstream in the instant appeal, we take the view that the general principle and the exceptions enunciated in the aforesaid authorities are now further strengthened, having regard to the provisions set out in r 18(1) and (2).

[27] Rule 18(2) was considered by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520. There, two new points viz illegality and jurisdiction were allowed to be taken for the first time at the appellate stage. At p 739 (MLJ); p 534 c-d (CLJ), Gopal Sri Ram JCA (later FCJ) proffered the following reasons:

> In my judgment, the categories of cases in which an appellate court will admit a new point are not closed. The governing principle is this: an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of the case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.
>
> Viewed from this standpoint, the justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has broken the law should succeed. Similarly, justice would, in the usual way, favour the admission of a point that goes to the jurisdiction of the trial court because neither consent nor waiver may confer jurisdiction where none exists: and it is not in the interests of justice that a judgment of a court lacking jurisdiction should be permitted to stand.

[28] The above judicial pronouncement was applied by the Court of Appeal in the majority judgment delivered by the same learned judge in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (CA).

[29] In *Indah Water Konsortium Sdn Bhd v Yong Kon Fatt* [2007] 5 MLJ 250; [2007] 4 CLJ 613, the Court of Appeal through the judgment of Heliliah Mohd Yusof JCA (now FCJ) invoked r 18(2) and allowed an argument to be advanced on a point that has not been raised in the High Court, thereby following *Luggage Distributors*, and another decision of this court in *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127 (CA). Her Ladyship concluded at p 269 (MLJ); p 639I (CLJ) as follows:

> Clearly, the Court of Appeal, both in England and here, is conferred with the power to make orders that the justice of the matter calls for, even in respect of matters not appealed against or raised as a ground of appeal.

[30] The same approach was adopted by Abdul Malek Ahmad JCA (later PCA) who delivered a dissenting judgment in *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1997] 2 MLJ 701; [1997] 2 CLJ 723 (CA) in which His Lordship allowed the issue of jurisdiction to be argued in the Court of Appeal although it was not raised in the High Court. His Lordship invoked r 18(2) and held at p 712 (MLJ); p 739c (CLJ) as follows:

> Despite the fact that the issue of jurisdiction was not raised in the High Court, it does not prohibit the appellant from raising it at the appeal stage in view of r 18(2) of the Rules of the Court of Appeal 1994. All the relevant authorities on the point of both the superior courts in England and in this country had been considered and analysed in the *Syarikat* case in great detail and I can only conclude that the position has been correctly stated.

[31] Where there was no objection, the Court of Appeal allowed a new point to be raised although it was not raised in the High Court. This was the case in *Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ 263; [1997] 1 CLJ 257 (CA), where at p 275 (MLJ); p 273 (CLJ), Abdul Malek Ahmad JCA (later PCA) said:

> However, before us, learned counsel for the appellant had raised a new point not raised before the learned trial judge and since learned senior federal counsel had no objections, and based on the Federal Court decisions in *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 and in *Letchumi & Anor v The Asia Insurance Co Ltd* [1972] 2 MLJ 105, the English Court of Appeal's finding *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473, this court's judgments in *Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd* [1995] 2 MLJ 851 and in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 and in view of r 18(2) of the Rules of the Court of Appeal 1994, we had allowed this point to be argued.

[32] In *Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd* [2004] 4 CLJ 18 (CA), two alternative grounds (viz termination of contract upon reasonable notice; and the application of the doctrine of estoppel) were not properly presented or sufficiently argued for the plaintiff. The High Court found for the defendant. The plaintiff's memorandum of appeal also did not take these points. However, the Court of Appeal allowed these grounds to be argued at the appellate stage. Gopal Sri Ram JCA (later FCJ) explained at pp 26f–27d as follows:

(a) Rule 18(2) makes it amply clear that this court in deciding an appeal is not confined to the grounds relied on by the appellant in his or her memorandum of appeal.

(b) An appeal is by way of rehearing and it is our solemn duty to make those orders that the learned judge ought to have made. As Suffian LP said in *Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254:

A Appeals to this court are by way of rehearing and we may give any judgment, make any order which ought to have been given or made (by the trial court) and make such further or other orders as the case requires, s 69(1) and (4) of the Courts of Judicature Act No 7 of 1964. This means, on the authority of *Quilter v Mapleson* (1881–2) 9 QBD 672 that we are authorised to make such order on this appeal as ought to be made according to the law as it B stands not at the time of the trial but at the time of this appeal.

(c) This court will not, as far as possible, permit a litigant to suffer because of the ineptitude of his advocate, and it is apposite to call to mind what Ong CJ said in *Wong Lai Fatt v Public Prosecutor* [1973] 2 MLJ 31:

C The paramount function and duty of the courts is to see that justice is done in all cases. As stated by Lord Denning MR in *Doyle v Olby Ltd* [1969] 2 QB 159 at p 166:

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. D

Those words were said in a civil case where counsel had made an erroneous submission on the proper measure of damages.

E (d) This was a case in which the proved and admitted facts all favour the plaintiff as a matter of law if they are slotted in the appropriate legal pigeon-hole, but that did not happen through error of counsel. That is no reason for judges of the appellate court to sit in silence, with arms folded in abject submission and permit an obvious miscarriage of justice to live on. Based on the authorities cited, this is an appropriate case by F reason of its peculiar facts to intervene.

[33] In the instant appeal, an important issue of jurisdiction (as shall be seen later in this judgment) was raised for the defendant under this head. We would apply the exceptions which were set out in the respective judgments of G Lord Parker and Lord Wrenbury in *Bank of Banbury*, and neatly crystallised by MacIntyre J (as he then was) in *Yong Mok Hin*, and also the 'interest of justice' approach taken by this court in the plethora of authorities in interpreting r 18(2). Having regard to the justice of this particular case, we do not think that we should shut our mind to this issue by excluding H arguments to be advanced by the defendant. We therefore answered the above question in the affirmative and allowed this issue to be ventilated by the parties herein.

SECTIONS 5 AND 6 OF THE GOVERNMENT PROCEEDINGS ACT I 1956

[34] Our affirmative answer above leads us to our consideration of the new ground of appeal based on ss 5 and 6 of the Government Proceedings Act 1956. These two sections read:

Liability of the Government in tort

5 Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

Limits of liability of the Government

6(1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[35] In essence, s 5 provides for the vicarious liability of the government for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as the vicarious liability of a private principal for his agent.

[36] Section 6 expressly prohibits the bringing of any proceedings against the government for damages under s 5 unless the action for such wrongful act, neglect or default would have lain against the officer personally. This is a substantive provision that goes to the jurisdiction of the court. Liability can only be attributed to the government where the officer's act, neglect or default is proved to have established the liability of the officer personally. In the absence of the officer's liability, (which can only arise and bind the officer(s) if and when the officer or officers are cited as defendants), no proceedings shall lie against the government. Where no such proceedings could lie against the government, the court is in no position to exercise any jurisdiction in relation thereto.

[37] Sections 5 and 6 were judicially considered by the High Court in *Haji Abdul Rahman v Government of Malaysia & Anor* [1966] 2 MLJ 174 (HC). There, the plaintiff brought an action to recover damages arising out of a traffic accident in which a government steam roller had been parked on the road at night. The deceased motorcyclist had crashed into it. The government servant was not joined as a defendant to the action. The issue was whether the action against the government as principal was bad in law. The High Court, having examined ss 5 and 6, concluded that the identity and liability of the government servant must be ascertained and established before the government could be made liable.

[38] An apparently conflicting view appears to have been taken in *Lai Seng & Co v Government of Malaysia & Ors* [1973] 2 MLJ 36. There, the dispute was in relation to 12 customs duties payable depending on the applicable taxing code to the plaintiff's goods. The defendants were (1) the Government of Malaysia; (2) the Comptroller-General of Customs and Excise; and (3) the Assistant Comptroller of Customs and Excise, Penang and Butterworth. The High Court held that in an action for tort, the proper defendant is the tortfeasor, but the person who is liable for the acts of the wrong-doer to whom the liability for the injury was passed is also a proper defendant. In the circumstances, the High Court held that the presence of the government was sufficient.

[39] The above two High Court judgments were the subject matters of scrutiny by the Federal Court in *Lay Kee Tee & Ors*. There, 184 respondents' (plaintiffs') causes of action were merely against the governments and were tort-based viz negligence, breach of fiduciary duties, breach of statutory duties, negligent misstatement, fraud etc. In essence, the relevant question was whether ss 5 and 6 require the alleged tortfeasors who are the public officers or employees of the government to be named and be sued in the claim. In delivering the judgment of the Federal Court, Nik Hashim FCJ agreed with the decision in *Haji Abdullah Rahman*. The Federal Court distinguished *Lai Seng & Co*, on the basis that the claim arose out of the revenue laws while *Haji Abdul Rahman*, was governed by ss 5 and 6. In the circumstances, the Federal Court held, inter alia, as follows:

> [16] Therefore, *on the proper construction of ss 5 and 6 …, in any claim in tort against the government, the officer of the government who was responsible for the alleged tortious act must be made a party and his liability be established before the government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the government*.
>
> [17] *In the present case, all the eight causes of actions are actions in tort or tort-based premised on the act or omission of an individual. None of the governments sued is capable of committing the wrong pleaded*. Since the governments' liability in tort could only be vicarious by virtue of ss 5 and 6, and *as the officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it was therefore not possible in law to maintain a successful claim in tort against the governments as primary tortfeasors*. That being so, the appellants' application to strike out the respondents' actions is meritorious. (Emphasis added.)

[40] Reverting to the instant appeal, we note that the alleged tortfeasors viz the government servants or officers had not been stated as defendants. This omission on the part of the plaintiff has resulted in the failure to satisfy the requirements of ss 5 and 6. That being the position, no proceedings shall lie

against the government ie the defendant herein, and consequentially, the High Court could not exercise jurisdiction in relation thereto. A

SECTIONS 37A AND 40 OF THE FOREST ENACTMENT

[41] It is also the defendant's contention that there was reasonable or probable cause to seize the 3,056 logs on 18 January 1997. The defendant sought protection under ss 37A and 40 of the Forest Enactment. B

[42] The plaintiff responded, inter alia, that the defendant's contention herein is wholly misconceived in law and in fact, as the learned judge had made a finding of fact that the impugned logs originated from Indonesia on the basis of the uncontroverted testimonies of the witnesses for the plaintiff. C

[43] In our view, s 37A precludes the entitlement to costs, damages or other relief, unless the seizure under the Forest Enactment was made without reasonable or probable cause. It reads: D

> No person shall in any proceeding before any court in respect of the seizure in the exercise or purported exercise of the powers conferred under this Enactment be entitled to the costs of such proceedings or to any damages or other relief other than an order for the return of such thing or the payment of their value unless seizure was made without reasonable or probable cause. E

[44] It is necessary for us to examine the burden of proof vis-a-vis the concluding words of s 37A viz 'unless seizure was made without reasonable or probable cause'. For this purpose, we would refer to the authorities in which the expression 'without reasonable and/or probable cause' was considered. F

[45] In *Chia Sia Chek v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors* [2009] 7 MLJ 609, the plaintiff was the fourth registered owner of a Honda Civic motorcar bearing registration No PDD 8281 ('the original motorcar'). While the original motorcar was in the possession of the third registered owner, it was then sold to Syarikat Chin Huat by way of tender. After the damaged original motorcar was satisfactorily repaired ('the repaired motorcar'), the plaintiff bought it and duly registered it in his name. The second defendant, the registrar of motor vehicles, is under a duty to inspect every vehicle submitted for registration or transfer of registration. Accordingly the plaintiff submitted the repaired motorcar to the second defendant for registration ie the repaired motorcar was brought to the second defendant to be inspected and to be weighed and measured, if necessary. If the physical structures of the repaired motorcar are not identical with the registration certificate, then the second defendant is under a duty to withhold its approval or to make the necessary amendments. In the meantime, the G H I

plaintiff had applied to the Road Transport Department, Penang for the engine of the repaired motorcar to be replaced. The second defendant duly approved the replacement of the engine. In this case, the second defendant had not withheld its approval for the registration of the car in the name of the plaintiff and the only amendment made by the second defendant in respect of the repaired motorcar was that the old engine number was cancelled and replaced by a new engine number. The repaired motorcar was used without interruption for almost two years by the plaintiff before it was detained and seized by an officer of the first defendant. The first defendant, which had the power to seize goods which contravene the Customs Act 1967 ('the Act'), asserted that they had seized the repaired motorcar as they had reasonable cause to suspect that the plaintiff's motorcar was uncustomed goods under the Act. Upon seizure, the car was immediately sent to the Department of Chemistry for examination where it was certified that the entire panel of the chassis was cut and replaced and that the new engine number had not been tampered with. The investigation conducted by the first defendant did not establish that the repaired motorcar was uncustomed goods and therefore did not institute any prosecution against anyone including the plaintiff. The plaintiff thereafter wrote repeatedly to the first defendant requesting that the repaired motorcar be released under s 115 of the Act pending completion of the investigation. However, when the first defendant failed to temporarily release the repaired motorcar, the plaintiff filed an originating summons seeking declarations and damages. It was the plaintiff's contention that as there was no reasonable cause before or at the time of the seizure to justify the detention of the repaired motorcar, the plaintiff was entitled not only to an order for the return of the repaired motorcar but also damages under s 132 of the Act. In allowing the plaintiff's application with costs, Zamani A Rahim JC (now J) held:

(1) The cumulative facts and circumstances in this case went to show that the repaired motorcar was not established to be uncustomed goods. In fact, representative of the first defendant had said that no offence had been committed in relation to the repaired motorcar under the Customs Act but that the repaired motorcar would therefore be handed over to the second defendant for investigation. However, the plaintiff's motorcar was never handed over to the Road Transport Department but instead the plaintiff was informed in writing that the plaintiff's case was being further investigated under the Act. This showed the first defendant's indecisiveness and also that their investigation was coming to a dead end. At the end of the day, the plaintiff was a bona fide purchaser in good faith and the repaired motorcar that was seized from his possession was registered in his name.

(2) *The customs officer who suspected the repaired motorcar to be uncustomed goods did not affirm any affidavit to depose that fact*. His affidavit evidence did not show the circumstances that had triggered reasonable

cause or reason to suspect that the repaired motorcar was uncustomed goods. In the absence of such reasonable cause, the seizure and detention of the repaired motorcar was unlawful.

[46] We pause here for a moment to note that the facts in *Chia Sia Chek* were different from those in the instant appeal, in that the customs officer in question did not affirm any affidavit to depose the fact that he had suspected the motorcar to be uncustomed goods and why. On the other hand, in the instant appeal, DW1, the Director of Forestry, did give viva voce evidence and was subject to cross-examination, as alluded to above. *Chia Sia Chek* is therefore readily distinguishable on the facts.

[47] Next, the expression 'reasonable and/or probable cause' was judicially considered largely in the context of actions founded on malicious prosecution. *Yap Piang v Wong Lee Nam* [1933] MLJ 102 concerns an action for damages for alleged wrongful arrest before judgment under s 492 of the (then) Civil Procedure Code. Thorne AG CJ held that the action was analogous to an action for damages for malicious prosecution, and *it is essential for the plaintiff to establish* malice and *the absence of reasonable and probable cause*. (Emphasis added.)

[48] In *Rawther v Abdul Kareem* [1966] 2 MLJ 201 (FC), the plaintiff successfully sued in the High Court for damages for malicious prosecution (*Abdul Kareem v Rawther* [1965] 2 MLJ 132). The facts revealed a dispute relating to a limited liability company carrying on business in Kuala Lumpur. The plaintiff claimed to be a shareholder in the company but the appellant alleged that he was not. Affidavits were filed in winding-up proceedings by the defendant and the plaintiff. As a result, it appears, of an anonymous letter, police investigations were conducted and the result was that the respondent was charged with making a false affidavit. He was acquitted at the trial and he subsequently brought the action for malicious prosecution against the defendant. The defendant did not appear at the trial and judgment was given against him. On appeal, the Federal Court held, inter alia, that *in all the circumstances of the case and on the evidence as it stood, it was clearly impossible to hold that the defendant was responsible for the prosecution unless it was proved that whatever statements he made to the police were made without a belief in their truth for which he had reasonable and probable cause; and there was no evidence in this case to make out an absence of reasonable and probable cause on the part of the defendant that would call for rebuttal from him*. Thomson LP reaffirmed the well-settled law that in an action of this nature, *the onus lies on the plaintiff to show that the prosecution of which he complains was instituted without reasonable and probable cause*. In the context of the case founded on malicious prosecution, the learned LP adopted the definition of 'reasonable and probable cause' given by Hawkins J in *Hicks v Faulkner* (1878) 8 QBD 167

at p 171 which was approved by the House of Lords in *Herniman v Smith* [1938] AC 305 at p 316 ie '... an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed' (see also *Chao Yan San v Yuen Ten Soo* [2000] 3 AMR 3057 (HC) per Richard Malanjum J (now CJ (Sabah and Sarawak)) at p 3061; and *Cheow Tong Chai & Anor v Tan Boon Lieu & Ors* [2010] 3 MLJ 91 (HC) per Aziah Ali J at p 99).

[49] From the above authorities, more specifically, the judgment of Thomson LP in *Rawther*, we are of the view that in the context of s 37A, the definition of the words 'reasonable or probable cause' may be applied mutatis mutandis to mean 'an honest belief in the rightful seizure of the logs in the exercise or purported exercise of the power conferred under the Forest Enactment, based upon a full conviction upon reasonable or probable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably or probably lead any ordinary prudent and cautious man, placed in the position of the officer(s) of the government, to the conclusion that the plaintiff was probably acting in contravention of any provision of the Forest Enactment'.

[50] As illustrated above, it is trite law that the burden of proof is cast on the plaintiff to establish that the seizure of the logs was made without reasonable or probable cause. This action is tort-based, premised on the seizure made by an individual(s). The Government of the State of Sabah (ie the defendant herein) is not an individual and is incapable of making the seizure. Hence, the singular significance in naming the alleged tortfeasor(s) as defendant(s). Since the alleged tortfeasors are not cited as defendants, no liability can be attributed to them. As the Government of the State of Sabah is incapable of making the seizure, no liability can be attached to it either. That being the case, the plaintiff could not be said to have discharged the burden of proving that the seizure of the logs had been made by the defendant without reasonable or probable cause. Consequently, there can be no question of calling for rebuttal from the defendant.

[51] Be that as it may, in any event, we find that there is evidence adduced at the trial that at the time of the seizure of the 3,056 logs, the plaintiff had no documents at all to show the sale and purchase of the logs from Indonesia. The evidence of Abdul Rashad bin Adam (SP6) confirmed that he had no documentation, and could not remember how much the plaintiff had paid for the logs. This evidence relating to the absence of documentation for the sale and purchase of the logs and the price therefor together with the other

factors mentioned by DW1, the Director of Forestry would give rise to a reasonable or probable cause for seizure and investigation under the Forest Enactment in order to ascertain whether the logs were actually imported from Indonesia. The original version of SP6's evidence under cross-examination reads:

> Saya tidak mempunyai apa-apa dokumentasi mengenai transaksi jual beli balak-balak tersebut dari Indonesia. Bayaran balak-balak ini dibayar kepada tuan punya ke Indonesia secara tunai. Bayaran tidak ada resit. Saya tidak ingat berapa harga yang dibayar oleh Syarikat Raspand bagi 3,056 batang balak ini.

Our translation:

> I do not have any documentation concerning the sale and purchase transaction of the logs from Indonesia. The payment for the logs was made to the owner in Indonesia by way of cash. There is no receipt for such payment. I do not remember the price which Syarikat Raspand paid for the 3,056 logs.

[52] The reasonable or probable cause for the seizure was also confirmed by the evidence adduced for the defendant through DW1, the Director of Forestry in paras 6–8 analysed earlier in this judgment. DW1's evidence, taken together with the evidence of SP6 in para 51 above shows, on a balance of probabilities, that there was reasonable or probable cause for the seizure of the logs. We therefore held that the seizure could not be said to have been made without reasonable or probable cause.

[53] We now proceed to consider s 40. Under s 40, as in s 37A, the burden of proof is on the plaintiff to establish that the plaintiff's loss or damage arose out of a malicious, fraudulent or grossly negligent act of the officer of the defendant. It reads, where relevant, as follows:

> The Government, forest officers, … shall not be held responsible for any loss or damage which may occur in respect of any forest produce or other property while detained by, or otherwise in the custody of, any such officer under this Enactment or the rules, or in respect of any timber taken into possession under section 26 of this Enactment, unless such loss or damage arose out of a malicious, fraudulent or grossly negligent act of any such officer.

[54] The non-citation of the alleged tortfeasors ie the officers as the defendants herein is again fatal to the plaintiff's case in so far as s 40 is concerned. Our interpretation of s 37A applies with necessary modifications to s 40 also. The plaintiff has therefore failed to discharge the burden of proving the tort-based elements viz a malicious, fraudulent or grossly

A negligent act of the officers set out in s 40.

CONCLUSION

B **[55]** On the foregoing grounds, we allowed this appeal and set aside the decision of the High Court. After hearing the respective views of learned counsel, we fixed the costs at RM10,000, here and in the court below. Deposit to be refunded to the defendant (appellant).

C **Mohd Hishamudin JCA (dissenting):**

[56] This is an appeal against the decision of the High Court of Kota Kinabalu. On 22 July 2005 the learned High Court judge had allowed the D plaintiff's (the respondent before this court) claim (but only confined to the issue of liability, with damages to be assessed) for the unlawful seizure of their logs which they had lawfully imported from Indonesia by the Forestry Department of Sabah. The State Government of Sabah E (appellant/defendant), dissatisfied with that decision, is now appealing to this court.

[57] I have dismissed the appeal with costs. The following are my grounds.

F **[58]** The plaintiff, a partnership firm, was engaged in trading activities involving the import and export of logs and the sale of imported logs to local sawmills in Tawau, Sabah.

G **[59]** The Ministry of Primary Industries had approved the plaintiff's application to import 100,000 cubic meters of logs for sale to local sawmills in Tawau and to import 50,000 cubic meters of logs for export sale.

[60] Pursuant to the aforesaid approval, the plaintiff imported 3,056 logs H from Indonesia.

On 18 January 1997, forest officers from the Forestry Department, Sabah, seized 3,056 logs belonging to the plaintiff at Wallace Bay Tawau. Out of these 3,056 logs, 980 logs were in the process of being loaded onto a vessel, I MV ABLE HELSMAN; while 2,076 logs were still on rafts.

[61] On 31 March 1997, the Tawau Magistrate's Court ordered the 3,056 logs to be returned to the plaintiff, the court holding that the plaintiff was entitled to the possession of those logs.

[62] On 1 April 1997, the defendant returned the said 3,056 logs to the plaintiff. A

[63] The police investigating officer, DSP Joseph Vun (PW2), who investigated the plaintiff's logs said in evidence that the logs originated from Indonesia and that he found no offence having been committed in respect of the logs (as to how the police also got involved with the logs will be explained later in this judgment). B

[64] At the time of the seizure, the plaintiff still had an unexhausted quota of 67,830 cubic meters of logs to be imported for supply to local sawmills; and an unexhausted quota of 36,340 cubic meters of logs to be imported for the purpose of export. C

[65] At the time of the seizure, the 980 logs measuring 7,072.44 cubic meters had a value of RM2,263,180.80; and the 2,076 logs measuring 15,805.20 cubic meters had a value of RM6,005,976. D

[66] At the trial below, the plaintiff only confined its claim to the 3,056 logs seized by the Forestry Department on 18 January 1997. E

[67] On 18 January 1997, the forest officers involved in the seizure and detention of plaintiff's logs were one Encik Sam Mannan (DW1) and two other forest officers, namely, Encik Yahya Awang and Encik Fidelis Edwin Bajau. F

[68] The plaintiff alleges that the seizure and detention of the logs was unlawful. The firm filed their writ of summons against the defendant on 8 April 1997. G

[69] Why did the forest officers seize and detain the plaintiff's logs? In law the burden is on the Forestry Department of Sabah/Government of the State of Sabah to justify the seizure and detention. In law, DW1 could seize and detain the logs only if he had a reasonable suspicion that an offence under the Forestry Enactment had been committed in relation to the logs. H

[70] The reason given by DW1 in examination-in-chief is as follows:

17 Q: What happen when you were at the loading area in Wallace Bay? I

A: Upon arrival at the Wallace Bay, we surveyed the swamp area and detected 2 rafts of approximately 2,157 logs in the fringes of Tawau Mangrove Forest Reserve and a raft of approximately 611 logs next to the ship. We inspected the logs and found that no FD hammer

markings, royalty markings, incised serial numbers or property marks on the logs. The logs only have painted numbers.

[71] In re-examination, the witness said:

Halim:

Were the logs seized by the Forest Department?

DW1:

They were detained.

Halim:

Why?

DW1:

Grounds of reasonable suspicion firstly, they have no marking like property hammer mark. No Forestry Department or inspection being hammered on the logs. Serial Numbers were not incised on the logs. They had no timber disposal permit (TDPs) to show that Government Royalty had been paid. Furthermore, the logs consist of species found in abundance in Sabah.

[72] DW1's evidence, however, must be considered in the light of para 7 of the appellant's statement of defence.

7 As to paragraph 12 of the Statement of Claim, the Defendant admits that the said Department seized 980 logs which were in the process of being loaded onto vessel MV ABLE HELMSMAN and another 2076 logs in the sea at Wallace Bay but denies that the seizure was wrongful or that the acts of seizure by the officers of the said Department were done maliciously or fraudulently or in gross negligence. The Defendant further states that the seizure was lawfully made in accordance with the provisions of section 36(1)(d)(i) of the Forest Enactment 1968 as the officers of the said Department had reason to believe that an offence of illegal possession of logs under section 30(1)(g) of the said Enactment had been committed based on one or more of the following grounds:

(a) The said logs were of the species normally produced in Sabah, e.g. keruing, seraya merah, seraya putih, melapi, kapur etc.;

(b) The said logs did not have any serial number on them;

(c) The said logs did not have any property hammer-mark on them;

(d) The said logs did not have any royalty hammer-mark to indicate that royalty had been paid to the Defendant;

(e) The said logs could not have come from Indonesia as Indonesia disallowed the export of logs at the material times; and

(f) In any case, there was no import licence issued in respect of the said logs as required under the Customs (Prohibition of Imports) Order 1988.

[73] As the above para 7 of the defendant's statement of defence has referred to two provisions of the Sabah Forest Enactment 1968, ('Forest Enactment') namely, s 30(1)(g) and s 36(1)(d)(i), I shall now refer to them.

[74] Section 36(1)(d)(i) states:

36 General powers of forest and police officers

(1) Any forest officer or police officer —

(d) may seize and detain —

(i) Any forest produce in respect of which there is reason to believe that a forest offence has been committed;

[75] Thus the Enactment makes it clear that the power to seize and detain any logs by a forest officer can only be exercised where there is reason to believe that a forest offence has been committed in respect of the logs.

[76] In my judgment, in order to determine as to whether a forest officer has 'reason to believe that a forest offence has been committed' the court must examine the circumstances objectively and not subjectively.

[77] Section 30(1)(g) provides:

General offences

30(1) Any person who, without lawful authority or legal right —

(g) keeps or has in his possession, custody or control any forest produce which bears any property mark or in respect of which a forest offence has been committed or upon which royalty or other payment due thereof has not been paid or made;

shall be guilty of an offence.

[78] From the above provision, the law is that it is an offence to be in possession, custody or control, without legal authority or legal right, any log which bears a property mark. But in the present case, it is the evidence of

DW1 that the logs bore no property marks. It is difficult to understand how the fact that the logs did not bear any property marks caused DW1 to reasonably suspect that an offence had been committed in relation to those logs.

[79] Secondly, it is an offence to be in possession, custody or control any log in respect of which a forest offence has been committed.

[80] Thirdly, it is an offence to be in possession, custody or control any log in respect of which royalty (or other payment due) has not been paid.

[81] It hardly needs stressing here that suspicion alone is insufficient to justify any seizure (and detention). The suspicion must have a basis; and it must have a reasonable basis.

[82] In my judgment, in the present case, looking at the matter objectively, at the time of seizure, the learned trial judge was right in rejecting DW1's claim that he had the reasonable suspicion to seize and to detain the logs. DW1 had a duty to make a basic inquiry before he made the seizure; but, alas, he did not. Yet he had every opportunity to do so — had he wanted to. For, he did meet the owner of the logs, one Encik Abdul Rashad (PW6). He said so in his evidence:

18

Q: Did you board the ship?

A: Yes. We found approximately 281 logs already loaded.

19

Q: What happened next?

A: At about 11.00 a.m., I informed the owner that the logs were detained for further investigation pursuant to the Forest Enactment.

20

Q: Who was the owner?

A: Encik Abdul Rashad of Syarikat Raspand.

[83] The fact that DW1 had no reasonable suspicion is, indeed, manifested by his very own evidence that he merely informed the owner that the logs were detained for further investigation pursuant to the Forest Enactment. It is trite law that DWI had no power to detain the logs 'for further investigation' in as much as no police officer may arrest a person on the street

merely for the purpose of further investigation — if the police officer in the first place has no reasonable suspicion of an arrestable offence having been committed by the person concerned. Suspicion alone (if at all there was any) is not enough to justify the seizure. DW1 could only detain the logs if he had reasonable suspicion that an offence under the Forest Enactment had been committed (for example, no royalty (payable under the Forest Enactment) had been paid in respect of the logs).

[84] In assessing the credibility of DW1 it is to be noted that nowhere in his examination in chief did DW1 say that he had a 'reasonable suspicion'. It was only in re-examination that he first mentioned the words 'reasonable suspicion', and to give his grounds for the 'suspicion'. In my judgment, this is a mere afterthought; and it was unfair and inappropriate to raise the issue of 'reasonable suspicion' at the re-examination stage; for the plaintiff was then deprived of the opportunity of cross-examining DW1 on that issue.

[85] Further, if, indeed, DW1 at the time of the seizure really had the reason to believe that a forest offence had been committed such as royalty not having been paid, why didn't he say so to the owner of the logs, PW6? Why did he only tell PW6 that the logs were detained for 'further investigation pursuant to the Forest Enactment'? Any reasonable officer in the position of DW1 would — indeed he is under a legal duty to — make a basic inquiry such as asking the owner as to the origins of the logs, as to the absence of government hammer markings (this question does not arise if the logs were imported) and as to whether any royalty had been paid (again, this question does not arise if the logs were imported); and if, after the inquiries, he were to form an opinion that he has a reasonable suspicion to seize the logs, he would have informed the owner of the logs of his reasonable suspicion. But, here, there is no evidence that DW1 had made a basic inquiry with the owner of the logs, PW6. Instead, we have the evidence of PW6 that he, prior to the seizure, voluntarily showed to DW1 that he had a permit to import those logs from Indonesia.

[86] The truth of the matter is that DW1 was not being candid with the court. In my judgment, based on the evidence before the court, DW1 must have known (or, at the very least, had reason to believe) that the logs were not from Sabah and that they were imported from Indonesia. DW1's evidence must be judged in the light of the evidence of the then Director of the Department of Forestry, Sabah, Encik Awang Tangah (PW3), who the learned trial judge found to be a credible witness. He said that he had been with the Forestry Department for 27 years. He said that even prior to 18 January 1997 the Forestry Department had already known that the logs (that were seized) originated from Indonesia. He said that the Forestry Department had sufficient evidence that the logs were not from Sabah. He said that under

the Forest Enactment of Sabah the Sabah forest officers had no power to seize or to detain logs that did not originate from Sabah. He said that what was done by the Forestry Department on 18 January in seizing the plaintiff's logs was unlawful. PW3 explained in cross-examination that the logs were bigger in size and of superior quality, as compared to local logs, and these facts indicate that the logs were not from Sabah. The length of some of the logs being less than 20 feet long, but bigger in diameter, are characteristics that suggest that they originated from Indonesia where the common method of timber operation was by way of 'kuda-kuda' (hand logging). PW3 added that the Security Officer of the Forestry Department had confirmed that the logs came from Indonesia.

[87] DW1's evidence must also be examined and evaluated in the light of the evidence of the Superintendent of Customs, Encik Sabardin (PW4), who confirmed that the plaintiff had a licence to import those logs from Indonesia; and that he had examined the plaintiff's logs and were satisfied that they co-related with the imported licence issued to the plaintiff.

[88] According to the evidence of PW6, at the time of the seizure he showed to DW1 the import licence (issued by the Ministry of Primary Industries) and the transshipment permit (issued by the Customs Department) but nonetheless DW1 still proceeded to seize his logs. In PW6's own words:

> Semasa Jabatan Perhutanan merampas kayu balak ini saya ada ke tempat berkenaan. Saya ada menjumpai pegawai tersebut. Mereka telah menjelaskan perkara tersebut. Mereka ialah Sam Mannan dan Felix Bajau. Saya ada menunjukkan permit dan lesen import. Mereka juga teruskan rampasan.

[89] In fact, the evidence shows that on the day in question, the target of DW1's investigation was on logs imported from Indonesia rather than on local logs. This is because a day earlier (ie on 17 January) he attended a meeting of a committee known as Jawatankuasa Pelaksanaan Dasar Perhutanan Negeri. The meeting was chaired by the Chief Minister. The following is DW1's evidence as to what transpired at the meeting:

> 8
>
> Q: Who chaired the meeting and what was discussed?
>
> A: The Chief Minister. On the issue of log transshipment via Wallace Bay and the entry of logs into Sabah from Indonesia.
>
> 9
>
> Q: Any instruction for the Forestry Department?

A: The Chief Minister instructed the Department to attend to the matter and to detain any vessels or logs concerned for further investigation.

...

12

Q: What happened next?

A: After the meeting, at 4.20 p.m., I was telephoned by YB Datuk Pandikar Amin Mulia that the CM wanted to speak to me. The CM directed me to go to Tawau to check, verify and detain any ship or ships and logs in Wallace Bay which were involved in transshipments and logs for import.

[90] Now, since the Forestry Department knew all along — even before 18 January — that the logs were from Indonesia, and, moreover, what was a matter of serious concerned to the Chief Minister at the meeting were the presence (and transshipment) of logs from Indonesia in Wallace Bay, therefore, DW1 also must have known (or, at the very least, had reason to believe) that the logs that he saw at Wallace Bay, belonging to the plaintiff, were indeed from Indonesia and that they were not local logs. Hence any question of payment (or non-payment) of royalty to the Forestry Department did not arise. This explains why DW1, when shown by PW6 the import licence that he had in relation to the logs, was not interested in inspecting the licence; for, DW1 very well knew (or, at the very least, had reason to believe) that the logs were from Indonesia. After all, he was an officer of the Forestry Department and the Forestry Department knew all along that the logs were from Indonesia. And if we were to go by the evidence of DW1, even the Chief Minister appeared to have known (or, at the very least, suspected) that the logs were from Indonesia.

[91] Now, since DW1 knew (or, at the very least, had reason to believe) that the logs were from Indonesia, then, it follows that DW1 also must have known (or, at the very least, had reason to believe) that the logs were not from Sabah. If DW1 also knew (or, at the very least, had reason to believe) that the logs were not from Sabah, then, it follows that DW1 knew (or, at the very least, had reason to believe) that no royalty under the Forest Enactment was payable in respect of those logs. If DW1 knew (or, at the very least, had reason to believe) that no royalty was payable, then what was the purpose of DW1 telling the court that he saw no government hammer marks on those logs (under r 15(1) of the Sabah Forest Rules 1969, the presence of a government hammer mark on a log indicates that it had been assessed for the amount of royalty payable)? The short answer is that DW1 was not a credible witness. He was merely trying to justify the seizure and detention that he had made in respect of the logs.

[92] In my judgment, DW1's own evidence shows that in seizing and detaining the logs he was merely following blindly the directives of the Chief Minister, whose directives were clearly unlawful. It was unlawful for the Chief Minister to direct or instruct DW1 to seize and detain vessels and logs at Wallace Bay. Under the Forest Enactment, he had no power to issue to DW1 (or for that matter to any forest officer) such a directive. It was an abuse of power on his part as the Chief Minister to have issued such a directive. And all the more so where, upon examining DW1's evidence, the nature of the alleged suspected offence is not clearly stated in the directive. DW1 should not have followed the directive. If the Chief Minister had any evidence that a forest offence had been committed in respect of those logs, then he should have lodged a complaint (and not issue a directive) with the Forestry Department, who should then carry out the necessary investigation. Whether any seizure or detention of logs should be made, that is a matter for the Forestry Department (and not the Chief Minister) to decide after making a fair and thorough investigation.

[93] Then there is the further disquieting evidence of DW1:

Halim:

Why was there no prosecution?

DW1:

We were directed by the Government to hand over the case to the Police for wider investigation, given that the Police have wider power and there was a suspicion that there were wide criminal activities.

Court:

When you said you were directed by the Government, who directed you.

DW1:

The Chief Minister then, Datuk Yong Teck Lee.

[94] Now, it was also unlawful for the Chief Minister to direct the Forestry Department to hand over the matter to the Police Department as the Forestry Department should be allowed to complete their investigation. Under the Forest Enactment, the Chief Minister has no power to issue such a directive. What the Chief Minister did amounts to interfering with the day to day functioning of the Forestry Department. Moreover, whether or not the case

should be handed over to the Police Department was for the Forestry Department to decide. The Chief Minister had no power to decide for the Forestry Department. If the Chief Minister had any evidence that an offence, other than a forestry offence, had been committed in respect of those logs, then he should lodge a complaint with the Police Department (or the Customs Department, as the case may be) and then it would be up to the Police Department (or the Customs Department) to investigate. The investigations could be done simultaneously by the respective Departments concerned.

[95] In the present case, the plaintiff called eight witnesses (including himself). Apart from himself (PW6), four other witnesses are material for the purpose of determining liability, and they are:

(a) PW2 — DSP Joseph Vun Fung Ming, the investigating officer from the Police Department;

(b) PW3 — Encik Awang Tangah, the Director of the Forestry Department at the material time;

(c) PW4 — Encik Sabardin, the Superintendent of Customs, who supervised the inspection of the logs by the Customs Department; and

(d) PW5 — Encik Abdul Hanan, the Secretary of the Wood-based Industries Division of the Ministry of Primary Industries, who confirmed that the plaintiff was issued with a licence to import logs from Indonesia.

[96] The defendant called only one witness, namely, Encik Sam Mannan (DW1) a forestry officer from the Forestry Department who had seized the plaintiff's logs. The other two forest officers (Encik Yahya Awang and Encik Fidelis Edwin Bajau) who were present together with DW1 at the time of the seizure were, however, not called as witnesses for the defence; neither was the Chief Minister (who, according to DW1, was unhappy with the presence of Indonesian logs in Wallace Bay) who directed DW1 to carry out the seizure.

[97] The learned trial judge made his findings (that I have alluded to in this judgment) after having had the benefit of seeing the demeanour and assessing the credibility of the witnesses. Among his important findings is the following:

> SP3 who had worked in the Forestry Department for 27 years testified as follows at page 4 of the Notes of Proceeding:
>
> > Sebelum 18/1/97 Jabatan Perhutanan tahu log-log berkenaan adalah berasal dari Indonesia. (Emphasis added.)

The defendant neither cross-examines nor challenges this piece of evidence. SP3 explained during cross-examination that the bigger size logs coupled with their superior quality indicate that those logs were not from Sabah as the logs from nearby area in Sabah were inferior in quality.

[98] It is trite law that I, as an appellate judge, should be slow in disturbing those findings unless I am of the view (which I am not) that the findings are perverse in the light of the evidence.

[99] The defendant, in their defence, also sought the protections of s 37A and s 40 of the Forest Enactment. Section 37A provides:

> No costs, damages etc., on seizure
>
> 37A No person shall in any proceedings before any court in respect of the seizure of anything seized in the exercise or purported exercise of the powers conferred under this Enactment be entitled to the costs of such proceedings or to any damages or other relief other than an order for the return of such thing or the payment of their value unless seizure was made without reasonable or probable cause.

[100] The learned trial judge is correct in his ruling that the defendant could not avail itself of the above provision as DW1 in seizing and detaining the logs was acting without reasonable or probable cause as DW1 knew or had reason to believe (based on the evidence of PW3) that the logs were not produced in Sabah but were from Indonesia.

[101] Section 40 provides:

> Non-liability of Government officers and members of the armed forces
>
> 40 The Government, forest officers, police officers and members of the armed forces shall not be held responsible for any loss or damage which may occur in respect of any forest produce or other property while detained by, or otherwise in the custody of, any such officer under this Enactment or the rules, or in respect of any timber taken into possession under section 26 of this Enactment, unless such loss or damage arose out of a malicious, fraudulent or grossly negligent act of any such officer.

[102] Whilst by reason of the definition of 'forest produce' as prescribed by s 2 of the Forest Enactment the plaintiff's logs, since they were imported from Indonesia, are not 'forest produce' for the purpose of the above provision, nonetheless, they, I think, fall under 'or other property'. But s 40 is only concerned with a property (or forest produce) 'while detained by, or otherwise in the custody of' a forest officer. In my opinion this provision is

only applicable where the *seizure* is lawful in the first place but *subsequently* damage is caused to the property, or loss is caused to the owner of the property, while the property was being *detained* or *in the custody* of an officer, by reason of a malicious, fraudulent or grossly negligent act of the officer concerned. It does not afford protection to the officer where the seizure was unlawful in the first place.

[103] But even assuming that I am wrong on this interpretation that I have given to s 40, still, the defendant could not rely on this provision as a defence as DW1 knew or had reason to believe that the plaintiff's logs were not from Sabah but from Indonesia, but yet he proceeded to seize and detain them. That makes his conduct not only unlawful but malicious as well.

[104] In the course of his submission before this court, the learned state attorney general, Datuk Rodric Fernandez, raised a new point: that the proceedings by the plaintiff against the defendant was procedurally flawed as the actual tortfeasor (or tortfeasors) should have been cited too as the defendant (or defendants) and not just the State Government of Sabah, citing ss 5 and 6 of the Government Proceedings Act 1956 and the Federal Court decision in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1. Now, this legal point was not raised before the High Court. The learned attorney general conceded that this point was also not put forward in the memorandum of appeal and that hitherto no application for leave had been made to include this new ground in the memorandum. But he, nonetheless, urged this court to consider it citing r 18(2) of the Rules of the Court of Appeal 1994. This provision reads:

> (2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

[105] The learned attorney general tried to impress upon the court the words:

> … but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

[106] Several authorities were cited by the learned attorney general including *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9.

[107] Learned counsel for the respondent, Encik B Sugumar objected to the raising of this new ground on the ground that it was neither pleaded nor raised before the High Court; and nor was it a ground in the memorandum

of appeal. He submitted that it would not be fair to the respondent/plaintiff if the appellant/defendant were to be allowed now to raise a new ground; more particularly, a new ground that is not raised in the memorandum of appeal. Learned counsel referred to that part of sub-r (2) of r 18 of the Rules of the Court of Appeal that stipulates:

> (2) The appellant shall not without the leave of the Court put forward any other ground of objection,

[108] He argued that the defendant had all the time to make an application for leave to the Court of Appeal to amend their memorandum of appeal to include this new ground but they had opted not to do so. Learned counsel cited, among others, *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29.

[109] In this judgment I do not propose to express any view on the issue as to whether the defendant could now raise this issue at the appellate stage merely by reason of the fact that such an issue was never canvassed at all before the High Court, although much energy was spent by counsel for both sides on this issue before this court (the Court of Appeal). But be that as it may, in my judgment, the objection by learned counsel for the respondent/plaintiff should be upheld as this new ground (*Lay Kee Tee* and ss 5 and 6 of the Government Proceedings Act) is not among the grounds that are set out in the memorandum of appeal. It is my view that there must be strict adherence and respect for the Rules of the Court of Appeal. Leave to include this new point must be obtained first; and the appellant/defendant had more than ample time to make an application for the leave as the judgment of the Federal Court in *Lay Kee Tee* was dated 30 October 2008 and reported in 1 MLJ 2009, that is to say, reported early in the year 2009. Moreover, this new ground that the learned attorney general attempted to raise before this court is not even a new or a novel issue at all: for, even before the Federal Court decision in *Lay Kee Tee*, such an issue had been canvassed before our courts. Such an issue had been canvassed in *Haji Abdul Rahman v Government of Malaysia & Anor* [1966] 2 MLJ 174; [1966] 1 LNS 60; in *Lai Seng & Co v Government of Malaysia & Ors* [1973] 2 MLJ 36; [1973] 1 LNS 70; and before the High Court in *Lay Kee Tee dan lain-lain lwn Kerajaan Malaysia dan lain-lain* [2005] 3 MLJ 576; [2004] 8 CLJ 382. This means that the appellant could have raised this issue even at the High Court had they been serious about raising it; but for reasons best known to themselves, they did not.

[110] Sub rule (2) of r 18 clearly states:

> (2) The appellant shall not without the leave of the Court put forward any other ground of objection,

[111] To my mind, the word 'shall' implies that obtaining the prior leave of the court is imperative. It is, however, true that under sub-r (2) of r 18 of the Rules of the Court of Appeal, the Court of Appeal may consider any ground not put forward in the memorandum of appeal. However, in my judgment, resorting to this 'exception' should only be done sparingly and in very exceptional circumstances; and even then, to my mind, as a rule, it ought to be at the instance or on the volition of the court rather than on the urging of a 'defaulting' party. With respect, for this court to allow this new point to be raised by the appellant in the circumstances and in the manner suggested by the learned attorney general, to my mind, is unfair and prejudicial to the respondent. This is particularly so when the learned attorney general had conceded that he had the opportunity to apply for leave (to add this new ground in the memorandum of appeal) had he wanted to, and he was not able to give a plausible explanation to the court when asked as to why he failed to do so. Indeed, I would even add that for this court now to allow the appellant to raise this new point without prior leave of this court would tantamount to giving an unwarranted broad and generous interpretation to the words:

> … but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

as found in sub-r (2) of r 18, and to my mind this is akin to allowing the appellant to raise a new point in the appeal not covered by the memorandum of appeal 'through the back door'.

[112] The authorities cited by the learned attorney general are of no assistance on this issue as they concerned the raising of issues before the appellate court that were not raised before the trial court. They are not concerned with applications to introduce new grounds of appeal without leave of court via sub-r (2) of r 18 of the Rules of the Court of Appeal.

Appeal allowed with costs here and below.

Reported by Kanesh Sundrum